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No. 96-96 267 AUG 14 1996

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

ROBERT W. BROOKS,

Petitioner,

v.

GEORGE COUNTY, MISSISSIPPI; EUGENE HOWELL, Individually and in His Official Capacity as Sheriff of George County, Mississippi; EARL KOSKELA, Individually and in His Official Capacity as District Attorney; WILBUR WARD, Individually and in His Official Capacity as Circuit Clerk of George County, Mississippi; DON PARIMON, JAMES COOPER AND GEORGE MILLER, Individually and in Their Official Capacities as Deputy Sheriffs of George County, Mississippi; BOARD OF SUPERVISORS OF GEORGE COUNTY, MISSISSIPPI, BEING NORMAN SEDRICK HOWELL, LARRY HAVARD, RALPH FAIRLEY, R. WAYNE CHRISTIAN AND CLYDE W. EUBANKS, SR., Individually and in Their Official Capacity as Supervisors for George County, Mississippi; UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation, and UNITED FIRE CASUALTY COMPANY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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51 pp

QUESTIONS PRESENTED

Robert W. Brooks, a pretrial detainee who was incarcerated in county jail for eight months after all charges against him were dropped, brought a 42 U.S.C. § 1983 action against George County, Mississippi, and various officials. While unlawfully incarcerated Robert W. Brooks was required to work for the George County Sheriff on both public and private property without pay or compensation.

The United States District Court for the Southern District of Mississippi dismissed Robert W. Brook's claim of unlawful incarceration as to all parties, determined that neither the District Attorney nor the court clerk were subject to claims for damages and, following trial entered judgment upon jury verdict for Robert W. Brooks on claims of involuntary servitude and violation of due process based upon lost wages.

The Defendants appealed to the Fifth Circuit Court of Appeals and Robert W. Brooks cross-appealed. On petition for rehearing the Fifth Circuit Court of Appeals held that: (1) work performed by Robert W. Brooks during incarceration did not constitute involuntary servitude; (2) Robert W. Brooks' failure to receive additional wages for work on private property was not a deprivation of property under the due process clause; (3) sheriff, but not deputy, deprived detainee of property right in wages for work performed on public property; (4) sheriff was not entitled to qualified immunity on due process claim; (5) sheriff had policy of not paying wages to detainees thus rendering county liable for constitutional deprivation; (6) liability exception for random and unauthorized acts was

QUESTIONS PRESENTED – Continued

inapplicable to claim for lost wages; (7) continued incarceration following valid arrest did not violate Fourth Amendment; (8) district attorney was immune from suit in both his official and individual capacity; (9) court clerk was not liable for failing to send dismissal order to Robert W. Brooks or his counsel. Consequently, the Court of Appeals affirmed in part, vacated in part, rendered in part, and remanded. The questions presented here are:

1. Does subjecting an unconvicted, unlawfully incarcerated pretrial detainee to the choice between leaving jail to work at the whim of the County Sheriff and remaining confined constitute punishment, and when combined with the conditions of his confinement remove any voluntariness from the detainee's decision to work or when detainee has no matter how painful a choice, there can be no involuntary servitude;

2. Is a pretrial detainee's failure to receive compensation for work on private property a deprivation of property under the due process clause as the Mississippi statutes upon which detainee bases his claim applies only to work performed on public property, or may a sheriff work inmates regardless of whether they were lawfully convicted on private property without being held liable for the due process deprivation; and

3. As the Mississippi statutes pertaining to employing a pretrial detainee require the establishment of the detainee's unconvicted status in justifying his employment, did the failure of the Sheriff for eight months effectively create a re-seizure of Robert W. Brooks thereby

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making his incarceration in violation of the Fourth and Fourteenth Amendments.

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PETITION FOR WRIT OF CERTIORARI

Robert W. Brooks ("Brooks") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 16, 1996, in order to resolve the conflict between the Fifth and Eighth Circuit Court of Appeals and the previous decisions of this Supreme Court of the United States on the important issues presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is published by order of the Fifth Circuit dated May 16, 1996, found at 77 F.3d 834. It is reprinted in Appendix A hereto ("App. A") at page A-1. The May 16, 1996 opinion is the decision on the part of the Fifth Circuit to deny the Respondents' Petition for Rehearing, whereupon the Fifth Circuit withdrew its previous opinion in this matter dated March 14, 1996 and substituted the May 16, 1996 opinion that gives rise to this petition.

JURISDICTION

On July 2, 1992, Brooks filed suit against George County, Mississippi; Sheriff Howell and George County deputy sheriffs Don Parimon, James Cooper, and George Miller; members of the George County, Mississippi board

of supervisors, individually and in their official capacities; Earl Koskela, district attorney for the Nineteenth Judicial District; Public Defender William T. Bailey; Wilbur G. Ward, circuit clerk of George County, Mississippi; and George County, Mississippi, pursuant to 42 U.S.C. § 1983. Brooks premised his claims upon alleged violations of the First, Fourth, Fifth, Sixth, Eighth, Thirteenth and Fourteenth Amendments.

The United States District Court for the Southern District of Mississippi upon motions for summary judgment dismissed all of Brooks' claims for unlawful incarceration and dismissed the district attorney, the public defender and circuit court clerk from any liability for damages. After a five day trial, the jury returned a verdict for Brooks and against Sheriff Howell, James Cooper and George Miller, deputy sheriffs of George County, and George County, Mississippi, awarding compensatory damages in the amount of $70,000.00, $50,000.00 for Brooks' claim of involuntary servitude under the Thirteenth Amendment and $20,000.00 for loss of wages in connection with Brooks' due process claim under the Fourteenth Amendment. In a bifurcated proceeding, the jury awarded punitive damages against Sheriff Howell in the amount of $5,000.00 and $500.00 against Deputy Sheriff Miller.

George County, Mississippi, *et al.*, filed a timely notice of appeal on September 6, 1994. Brooks filed a timely cross-appeal with respect to the grant of partial summary judgment on his claims of unlawful incarceration and dismissal of all claims against the district attorney and circuit clerk.

Upon timely appeal, the United States Court of Appeals for the Fifth Circuit issued an Opinion found on 77 F.3d 834, affirming in part, vacating in part, rendered in part, and remanded. On May 16, 1996, the Fifth Circuit denied George County, Mississippi, et al., timely filed petition for rehearing, withdrew its previous opinion found at 77 F.3d 834, and substituted the opinion that gives rise to this petition. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the filing of the substitute opinion dated May 16, 1996.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

The Fourth Amendment to the United States Constitution provides in pertinent part as follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated,. . . .

The Thirteenth Amendment to the United States Constitution provides:

> Section 1: Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2: Congress shall have power to enforce this article by appropriate legislation.

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> Section 1: * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 47-1-21 of the Mississippi Code Annotated, 1972, provides:

> The Sheriff of each county shall keep a well bound alphabetical jail docket. In it he shall promptly enter under the proper initial the name, age, color and sex of each convict, the date of his or her commitment, each day worked on the county farm, time required to be served and amount of fine and costs and the jail fees charged against the prisoner and the date of discharge.
>
> The sheriff shall submit his docket to the board of supervisors at each of their regular meetings, and the same shall be examined carefully by the president of the board, and by any other members who desire to examine the same, in the presence of the board while in session.

Miss. Code Ann. § 47-1-3 (1972), provides in pertinent part:

> It is the imperative duty of the board of supervisors in each county in this state to require each convict sentenced to imprisonment in the county jail and the payment of a fine and costs, or to imprisonment and payment of costs, or to

payment of fine and costs, to work out the sentence on the county convict farm or on the public roads or other public works of the county, or in a contiguous county, as herein provided.

Miss. Code Ann. § 47-1-9 (1972), provides:

In any county where it is clearly more advantageous to the county to work county convicts or some of them on the public roads of the county, or on other works of the county exclusively public in their character, the board of supervisors shall have authority so to order, and in such cases the board shall establish all proper regulations for the working, guarding, safekeeping, clothing, housing and subsistence of convicts while so working, and shall provide all the necessary equipment for such purpose. The board shall establish regulations for the discipline of convicts on said works, and on county farms when a convict is persistently idle or refractory, and may enforce such regulations by penalties.

Miss. Code Ann. § 47-1-13 (1972), provides:

Any person being held in the county jail in default of bail to await trial, except those held for treason, murder, arson, or rape, and except as the sheriff may deem it improper to let out, may upon application to the sheriff of the county, be allowed to work on the county farm or on the public roads or other county public works as other convicts are worked and at the same wage. The board of supervisors shall settle with the prisoners so working at their regular meetings monthly. But if it appears that it is not to the best interest of the county to work such

prisoners, the board may decline at any time to employ them.

Miss. Code Ann. § 47-1-19 (1972), provides:

It shall be unlawful for any county prison or prisoners to be leased or hired to any individual or corporation for any purpose whatsoever. Nor shall they be worked under any contractor; but in working them on county farms, or on the public roads or on any other work, which work must be of exclusively public character, they shall be under exclusive official control and management.

Miss. Const. Art. 10 § 226, provides:

Convicts sentenced to the county jail shall not be hired or leased to any person or corporation outside the county of their conviction after the first day of the January, A.D. 1893, nor for a term that shall extend beyond that date.

42 U.S.C. § 1983, provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage of any state, territory of the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law suit inequity or other proper proceeding for redress.

STATEMENT OF THE CASE

On July 2, 1992, Brooks filed suit against George County, Mississippi Sheriff Howell and George County deputy sheriffs Don Parimon, James Cooper, and George Miller; members of the George County, Mississippi board of supervisors, individually and in their official capacities; Earl Koskela, district attorney for the Nineteenth Judicial District; Public Defender William T. Bailey; Wilbur G. Ward, circuit clerk of George County, Mississippi; and George County, Mississippi, pursuant to 42 U.S.C. § 1983. Brooks premised his claims upon alleged violations of the First, Fourth, Fifth, Sixth, Eighth, Thirteenth and Fourteenth Amendments.

The United States District Court for the Southern District of Mississippi upon motions for summary judgment dismissed all of Brooks' claims for unlawful incarceration and dismissed the district attorney, the public defender and circuit court clerk from any liability for damages.

During a five day trial Brooks established that on July 28, 1990, Brooks was arrested by the George County Sheriff's Department and incarcerated in the George County Jail located in Lucedale, George County, Mississippi, pending a preliminary hearing on the felony charge of grand larceny. At the preliminary hearing a public defender was appointed to represent Brooks, his bond was reduced and he waived his preliminary hearing. Brooks obtained his release on bond. While on bond, the George County grand jury, meeting in the October term of 1990, returned two indictments against Dale C. Brooks

and Robert W. Brooks as co-defendants and charging same with felony burglary and grand larceny.

On December 27, 1990, subsequent to the issuance of the indictments but prior to the service of capias and arrest thereafter, an affidavit was filed charging Brooks with grand larceny. Brooks was arrested by authorities in Virginia pursuant to the notice placed with the National Criminal Information Center ("NCIC") pursuant to the aforesaid affidavit.

Brooks waived extradition and was returned to George County, Mississippi, pursuant to the affidavit of grand larceny on or about January 21, 1991. Upon his return to George County, Mississippi, Brooks was served with the capias that issued for the indictments. Brooks remained incarcerated in the George County Jail from January 21, 1991, until his release on October 1, 1991.

The grand jury did not indict Brooks upon the affidavit of grand larceny reported on NCIC. Consequently, the only outstanding charges on Brooks were the two aforementioned indictments.

After Plaintiff was returned on January 21, 1991, and incarcerated in the George County Jail. Brooks was arraigned and entered a plea of not guilty. No further judicial action was had on Brooks' pending criminal case until the entry of the Nolle Prosequi Order on February 5, 1991. The Nolle Prosequi Order dismissed all charges pending against Brooks. Brooks was not informed of the entry of the Nolle Prosequi Order.

On January 28, 1991, Brooks' co-defendant entered a plea of guilty to the crimes alleged in the indictments.

On February 4, 1991, the State of Mississippi, obtained a Nolle Prosequi Order which dismissed all indictments against Brooks due to insufficient evidence. Said Nolle Prosequi Order was filed with the Clerk of the Circuit Court of George County, Mississippi, on February 5, 1991.

While incarcerated from January 21, 1991, until February 5, 1991, Brooks held the status of a pretrial detainee. After February 5, 1991, Brooks was held unlawfully without any charges pending and was in fact an unlawfully incarcerated citizen. Brooks was not serving time or incarcerated for a conviction on any felony or misdemeanor. Brooks was incarcerated in the George County Jail which is under the care and custody of Sheriff Howell and his agents.

Beginning in March, 1991, and continuing until October 1, 1991, the date of Brooks' release from custody, Brooks was required to provide services and perform manual labor for the Sheriff, his deputies, private citizens and George County, Mississippi. The labor required included, but was not limited to, the following: building a fence for the Sheriff's private fence company and for the Sheriff's pecuniary benefit; demonstrating the county drug dog by being removed from his cell and having said dog attack him at the direction of a deputy sheriff; courthouse maintenance; mowing both private and county lawns; moving private citizens' furniture; maintaining the sheriff department vehicles; and various other duties pertaining to the care and upkeep of the courthouse and its grounds. Brooks was required to perform personal services for the deputies including harvesting peanuts, cutting firewood, and building dog pens.

Sheriff Howell loaned Brooks to a private citizen to cook at a function in another county unsupervised or escorted by law enforcement officials. Sheriff Howell provided Brooks to his brother to install a fence on private property. Sheriff Howell was paid for the work performed by Brooks but did not pay Brooks or the County for his labor.

In addition to the personal service provided to the Sheriff, county, and deputies, Brooks also was required to work at the Red Cross Organization, the director of the Community Work Center for work on municipal property, and the washing of private vehicles on county ground with county utilities.

The use of inmate labor for the benefit of private citizens on private property was established at trial as a matter of custom, policy and practice. The president of the board of supervisors testified that Sheriff Howell's fence company removed a fence from the board president's church property. The church paid Sheriff Howell $650.00 for the fence removal and Brooks and other inmates did the labor.

Brooks was paid for some services (two cans of tobacco snuff for erecting a dog pen) but was not paid for any work performed on public property or for Sheriff Howell's fence company. For the most part, Brooks was not paid any wage for his service. Sheriff Howell made it clear in his testimony that Brooks' freedom from incarceration while working was the benefit of his bargain. However, Brooks' freedom from incarceration should have been provided on February 5, 1991, not October 1, 1991.

The jury returned a verdict for Brooks and against Sheriff Howell, James Cooper and George Miller, deputy sheriffs of George County, and George County, Mississippi, awarding compensatory damages in the amount of $70,000.00, $50,000.00 for Brooks' claim of involuntary servitude under the Thirteenth Amendment and $20,000.00 for lost wages in connection with Brooks' due process claim under the Fourteenth Amendment. In a bifurcated proceeding, the jury awarded punitive damages against Sheriff Howell in the amount of $5,000.00 and $500.00 against Deputy Sheriff Miller.

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is published by order of the Fifth Circuit dated May 16, 1996, found at 77 F.3d 834. It is reprinted in Appendix A hereto ("App. A") at Page A-1. The May 16, 1996 opinion is the decision on the part of the Fifth Circuit to deny the Respondents' Petition for Rehearing, whereupon the Fifth Circuit withdrew its previous opinion in this matter dated March 14, 1996 and substituted the May 16, 1996 opinion that gives rise to this petition.

The Fifth Circuit reversed and rendered the jury award premised upon involuntary servitude holding:

> "When the employee has a choice even though it is a painful one, there is no involuntary servitude. . . . A showing of compulsion is thus prerequisite to proof of involuntary servitude."
>
> *Citing Watson v. Graves*, 909 F.2d 1549, 1552 (5th Cir. 1990).

The Fifth Circuit reasoned since Brooks

> . . . desired to leave jail and chose to work as the price for that right. Since Brooks was not being punished by being a pretrial detainee until trial, the choice between his confinement and work as a trusty cannot be considered coercive because the benefits he received working were not benefits for which he was otherwise entitled. Admittedly, the choice described might have been a painful one, but it was nonetheless a choice.

The Fifth Circuit acknowledged that Mississippi law established a cognizable property right in wages for work performed on public property as a pretrial detainee. However, the Fifth Circuit held that no legitimate expectation of entitlement to wages for work performed on private property existed since the Mississippi statutes only permit work upon public property.

The Fifth Circuit held:

> Those statutes do not provide for payments for work on private property. In fact, under Mississippi law, prisoners may only do work of an 'exclusively public character.' See Miss. Code Ann. §§ 47-1-19, 47-1-3. We therefore find that Brooks' failure to receive compensation for his work on private property over and above the compensation he actually received does not constitute a deprivation of a cognizable property right.

The Fifth Circuit further held that the district court was correct in granting summary judgment and finding that there was no illegal incarceration under the Fourth Amendment.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Opinion Directly Conflicts With The Eighth Circuit's Ruling In *Bell v. Wolff*, 496 F.2d 1252 (8th Cir. 1974), Is Contrary To *United States v. Kozminski*, 47 U.S. 931 (1988), And Contrary To The Thirteenth Amendment Of The Constitution Of The United States.

The decision below is in direct conflict with the Eighth Circuit's decision in *Bell v. Wolff*, 496 F.2d 1252 (8th Cir. 1974), and *United States v. Kozminski*, 47 U.S. 931, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988). Certiorari is appropriate here. *See Acosta v. Louisiana Dept. Of Health & Human Res.*, 478 U.S. 251, 253 (1986) (Court granted petition to resolve conflicting interpretations of Fed. R. App. P. 4 and affirmed in *per curiam* opinion). *See also* Supreme Court Rule 10 (a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter).

The Eighth Circuit in *Bell*, at 1254, held that subjecting a pretrial detainee to the choice between leaving jail and to work and remaining confined can constitute punishment and the conditions of his confinement may remove any voluntariness from the detainee's decision to work.

The United States Supreme Court in *Kozminski*, 101 L.Ed.2d at 788, defined involuntary servitude:

> "A condition of servitude in which the victim is forced to work for the Defendant by the use of threat, physical restraint, or physical injury, or by the use of threat or coercion by law, or the legal process. . . .

In sharp contrast to *Bell* and *Kozminski*, the Fifth Circuit has held that any choice to work made by a detainee, regardless of the conditions or circumstances of his incarceration, is sufficient to remove the character of the work as involuntary. In fact the decision cited as authority for the premise that a choice to work presented a voluntary scenario and therefore not violative of the Thirteenth Amendment is factually distinguishable from the present case. *Watson v. Graves*, 909 F.2d 1549 (5th Cir.1990) involved two *convicted* inmates whose work regardless of whether same is voluntary is not prohibited by the Thirteenth Amendment. The Fifth Circuit in the present case disregarded the *unconvicted* status of Brooks and treated him as if convicted by the mere nature of his illegal incarceration.

The conflict between the positions is clear and irreconcilable. Certiorari is appropriate.

II. The Fifth Circuit's Ruling That No Legitimate Expectation Of Entitlement To Compensation For Work Performed On Private Property By A Pretrial Detainee Has Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court.

The decision below creates a constitutionally unpalatable dilemma. The Fifth Circuit's opinion denies Brooks' due process claim for wages by holding that when performing work at the instruction of the sheriff, his deputies or other authorities of the state on private property, no legitimate expectation of entitlement to compensation can exist since Mississippi law specifically prohibits work on any property not of an exclusive public character.

Consequently, the Fifth Circuit has authorized and condoned a practice that effectively denies redress to the individual who is working on private property under the authority of the State. In the context of a pretrial detainee, the detainee may not recover wages, under any circumstances, and if not convicted of the crime with which he is charged the detainee will receive no credit for the work performed.

To take the analogy further, pursuant to Miss. Code Ann. § 47-1-19 (1972), no county official can agree to employ pretrial detainees for work on private property. Therefore, a pretrial detainee is faced with the unique and unfortunate decision of being freed from confinement to illegally work on private property or being incarcerated. The pretrial detainee may violate the law to stay in good graces with his jailers or refuse to do the work and suffer possible sanctions. Since Eugene Howell, the duly elected sheriff of George County, Mississippi clearly violated this provision, a duty to act accordingly existed, and the failure to act accordingly was a clear violation of the Constitution. *See Salas v. Carpenter*, 980 F.2d 299 at 307 (5th Cir. 1992).

Clearly, the Fifth Circuit's decision of federal law has not been previously decided by this Court, but should be. *See* Supreme Court Rule 10. The importance of this ruling and the subsequent danger it poses with respect to due process rights of individuals is substantial. Certiorari is appropriate.

III. The Fifth Circuit's Opinion Authorizes The Sheriff To Violate Mississippi Law By Not Requiring The Sheriff To Ascertain The Status Of A Detainee As Required By Mississippi Statute And Thereby Approved An Illegal And Unauthorized Seizure Of Brooks' Person In Violation Of The Fourth And Fourteenth Amendments Of The United States Constitution And Therefore Has Decided An Important Question Of Federal Law Should Be Settled By This Court.

The laws of Mississippi require that the Sheriff present for approval for hiring a pretrial detainee to the board of supervisors of the county. In the instant case, Brooks was not forced to work for the Sheriff until after all charges had been dismissed. If the Sheriff had reviewed the file and presented the statutorily required documentation, he would have discovered the Order effectively dismissing all charges against Brooks. The Sheriff's failure to carry out his statutory duty resulted in Brooks' continued incarceration.

The Fifth Circuit affirmed the District Court's grant of summary judgment and refused to consider the issue of whether or not the Sheriff's actions resulted in a seizure violative of the Fourth Amendment. In reaching its decision, the Fifth Circuit applied its own standard found in the case of *Valencia v. Wiggins*, 981 F.2d 1440, 1449 (5th Cir.) *cert. denied* 509 U.S. 905, 113 S.Ct. 2998, 125 L.Ed.2d 691 (1993) for the notion that the Fourth Amendment does not apply when the challenge is based upon continued incarceration, notwithstanding the fact that no criminal charges remain pending. Respectfully, the Fifth Circuit's ruling in *Valencia* and reliance thereon in the

case *sub. judice* is clearly contrary to this Court's previous pronouncements in *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877, 20 L.Ed.2d 889 (1968); *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980); and *California v. Hodari*, 499 U.S. 621, 624, 111 S.Ct. 1547, 1549, 113 L.Ed.2d 690 (1991). In addition, the Petitioner would note to the Court that the Fifth Circuit opinion ignored the Petitioner's Fourteenth Amendment claim regarding deprivation of liberty and Brooks' "special relationship to the state" as recognized by *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989).

Clearly, if the Sheriff had performed his statutory duties Brooks would have been released from his incarceration or at least afforded an opportunity to petition the Court for review. The initial seizure of Brooks was justified by affidavit and capias as provided by statute and Mississippi case law. The fact the initial incarceration was performed correctly does not diminish the Sheriff's other statutory duties and obligations nor his liability for failure to perform same. Certiorari is appropriate.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner

Robert W. BROOKS, Plaintiff-Appellee Cross-Appellant

v.

GEORGE COUNTY, MISSISSIPPI, et al., Defendants,

George County, Mississippi, et al., Defendant-Appellants Cross-Appellee,

Wilbur Ward and Earl Koskela, Defendants Cross-Appellees.

No. 94-60619.

United States Court of Appeals, Fifth Circuit.

May 16, 1996.

Pretrial detainee who was incarcerated in county jail for eight months after charges against him were dropped brought § 1983 action against county and various officials. The United States District Court for the Southern District of Mississippi, Walter J. Gex, III, J., dismissed detainee's claim of unlawful incarceration as to all parties, determined that neither district attorney nor court clerk were subject to claims for damages and, following trial, entered judgment upon jury verdict for detainee on claims of involuntary servitude and violation of due process based on lost wages. Defendants appealed, and detainee cross-appealed. On petition for rehearing, the Court of Appeals, Reynaldo G. Garza, Circuit Judge, held that: (1) work performed by detainee during incarceration did not constitute involuntary servitude; (2) detainee's failure to receive additional wages for work on private property was not deprivation of property under due process clause; (3) sheriff, but not deputy, deprived

detainee of property right in wages for work performed on public property; (4) sheriff was not entitled to qualified immunity on due process claim; (5) sheriff had policy of not paying wages to detainees, thus rendering county liable for constitutional deprivation; (6) liability exception for random and unauthorized acts was inapplicable to claim for lost wages; (7) continued incarceration following valid arrest did not violate Fourth Amendment; (8) district attorney was immune from suit in both his official and individual capacity; and (9) court clerk was not liable for failing to send dismissal order to detainee or his counsel.

Affirmed in part, vacated in part, rendered in part, and remanded.

Opinion, 77 F.3d 834, withdrawn.

Appeals from the United States District Court for the Southern District of Mississippi.

Before REYNALDO G. GARZA, JOLLY and DUHÉ, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

Today we have entered an order denying the Appellants' Petition for Rehearing in the above case. However, we withdraw our prior opinion on this matter, found at 77 F.3d 834, and substitute the following opinion.

Background

Robert W. Brooks successfully brought claims under the Thirteenth and Fourteenth Amendments of the

United States Constitution for his continued incarceration in a county jail eight months after the charges against him had been dropped. Eugene Howell, Sheriff of George County, Mississippi ("Sheriff Howell" or "the Sheriff"), arrested Robert W. Brooks ("Brooks") in Virginia, where Brooks, who was out on bond, had fled after indictments were returned against him for grand larceny and felony burglary in Mississippi. Brooks was incarcerated in the George County jail on January 21, 1991, and was arraigned on the indictments on January 28, 1991.

On or about the same day, Gary Evans, assistant district attorney for the Nineteenth Judicial Circuit, requested that the charges against Brooks be dismissed pursuant to a nolle prosequi order. An order granting the district attorney's motion was signed on February 4, 1991, in Jackson County, Mississippi, by Judge Clinton E. Lockard. On February 5, 1992, the district attorney's office filed a copy of the order at the George County Circuit Clerk's office. The order was filed the same date by an employee of the circuit clerk of George County. Evans apparently informed Brooks's attorney, William T. Bailey, of the state's intention to seek dismissal prior to making the motion. However, neither the Sheriff's office nor Brooks was notified of the dismissal. Brooks was not released until he discovered and showed the order to Sheriff Howell on October 1, 1991.

In March 1991, during the time period in which he was confined in the George County jail, Brooks requested and was granted trusty status. Brooks specifically asked that he be made trusty. As a trusty, Brooks was not locked down in his cell, but was, instead, allowed the freedom to

roam in and out of his cell, Sheriff Howell's office, the jail and the surrounding grounds area.

While incarcerated, Brooks performed, at his own request, various services for Sheriff Howell, George County and others, including several charitable and benevolent organizations. Brooks performed these services on public property as well as private property.[1] Brooks performed these services for two reasons: (1) he was able to secure his release from jail during the day and (2) Brooks earned extra money by working on the outside. Brooks was not compensated for those services he performed on public property, but on several occasions, was paid money or received goods in exchange for the services he rendered on private property.

Brooks brought an action in the Southern District of Mississippi, Southern Division, on July 1, 1992, against Sheriff Howell and a number of deputy sheriffs of George County; members of the board of supervisors of George County; Earl Koskela, district attorney for the Nineteenth Judicial District; Public Defender William T. Bailey; Wilbur G. Ward, circuit clerk of George County; and other public officials in their official and individual capacities, as well as George County, pursuant to 42 U.S.C. § 1983.[2] Brooks's claims were premised upon alleged violations of the First, Fourth, Fifth, Sixth, Eighth, Thirteenth, and

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[1] Examples of work done on private property include construction of a dog pen for Deputy Sheriff Miller and installation of a fence for Sheriff Howell's sideline fencing business.

[2] Brooks also raised a number of state law claims that were dismissed without prejudice on summary judgment.

Fourteenth Amendments as a result of his incarceration after the nolle prosequi order had been entered in February, 1991. Brooks claimed that he was unlawfully and falsely incarcerated during this period of time. He also alleged that, while incarcerated, he was forced or coerced into working on public and private property, amounting to involuntary servitude under the Thirteenth Amendment. Because he was not always paid for his services, he also claimed a violation of his due process rights under the Fourteenth Amendment.

On motions for summary judgment, the district court dismissed Brooks's claims of unlawful incarceration arising from the entry of the nolle prosequi order as to all parties. The district court also held that neither the district attorney nor the clerk were subject to any of Brooks's claims for damages. The remaining parties moved in limine to exclude certain evidence from the trial, notably evidence of Brooks's status after the entry of the nolle prosequi order. The district court denied the motion. After a five-day trial, the jury returned a verdict for Brooks against Sheriff Howell, James Cooper and George Miller, deputy sheriffs of George County, and George County (collectively, the "Appellants"), awarding compensatory damages in the amount of $70,000, $50,000 of which represented damages concerning Brooks's claim of involuntary servitude under the Thirteenth Amendment and $20,000 representing lost wages in connection with Brooks's due process claims under the Fourteenth Amendment. In a bifurcated proceeding, the jury awarded punitive damages against Sheriff Howell and Deputy Miller in their individual capacities in the amount of $5,000 and $500, respectively.

Appellants filed a timely notice of appeal on September 6, 1994. Brooks filed a cross-appeal with respect to the district court's granting of partial summary judgment on his claims of unlawful incarceration and dismissal of all claims against the district attorney and the clerk. We affirm in part and reverse in part the judgment for Brooks in the manner hereinafter described.

Discussion

Brooks prevailed on his claims under the Thirteenth and Fourteenth Amendments with regard to his work as a trusty while in the George County jail. Appellants argue that these claims should not have gone before the jury. We will discuss in turn the merits of each of these constitutional claims as well as the unlawful incarceration claims Brooks lost on summary judgment and dismissal from the suit of the district attorney and the clerk.

A. Claims Based on Work as a Trusty

1. Thirteenth Amendment – Involuntary Servitude Claim

Brooks alleged that his choice between staying in jail or working when he was not supposed to be in jail amounted to involuntary servitude. We begin by asking whether the record contained substantial evidence to create a jury question on involuntary servitude. *Boeing v. Shipman,* 411 F.2d 365, 375 (5th Cir.1969).

The Thirteenth Amendment to the Constitution provides that "[n]either slavery nor involuntary servitude, except as punishment for a crime whereof the party shall

have been duly convicted, shall exist within the United States or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1. The Fifth Circuit defines involuntary servitude as "an action by the master causing the servant to have, or to believe he has, no way to avoid continued service or confinement." *Watson v. Graves*, 909 F.2d 1549, 1552 (5th Cir.1990). "When the employee has a choice, even though it is a painful one, there is no involuntary servitude . . . A showing of compulsion is thus a prerequisite to proof of involuntary servitude." *Id.*

In *Watson*, this Circuit held that two inmates who requested to work outside of jail made such a choice voluntarily and presented no Thirteenth Amendment claim. *Id.* at 1552-1553. The prison context made this choice no less voluntary. Examining the record, we find Brooks's situation to be similar to that of the inmates in *Watson*.

The county held Brooks as a pretrial detainee. In that status, Brooks was entitled only to be confined until trial; the Appellants were under no obligation to allow Brooks the freedom he enjoyed. Brooks made the request for trusty status. He desired to leave the jail and chose to work as the price for that right. Since Brooks was not being punished by being detained until trial, the choice between this confinement and work as a trusty cannot be considered coercive because the benefits he received for working were not benefits for which he was otherwise entitled. Admittedly, the choice described might have been a painful one, but it was nonetheless a choice.

The district court granted Appellants partial summary judgment on Brooks's claims relating to unlawful

incarceration, absolving Appellants of legal liability. To find the Appellants liable for involuntary servitude based on a nolle prosequi order which provides no basis for liability under unlawful incarceration would defy common sense. Like the inmates in *Watson,* Brooks had a choice, albeit a painful one. He was, however, not subject to *involuntary* servitude and thus presented no claim under the Thirteenth Amendment.[3]

2. Fourteenth Amendment – Procedural Due Process Claim

Brooks claimed that Appellants' failure to compensate him for any of his work on public property, and their failure to compensate him for part of his work on private property, constituted a deprivation of property without due process of law in violation of the Fourteenth Amendment.[4] The jury found Sheriff Howell and Deputy Miller

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[3] Because we hold that Brooks presented no claim for involuntary servitude, we do not address whether Appellants were qualifiedly immune from liability in their individual capacities or whether Appellants were liable in their official capacities under the Thirteenth Amendment. We also do not address whether admission of evidence of Brook's unlawful incarceration was proper.

[4] Appellants argue that Brooks never properly made a procedural due process claim for deprivation of wages under the Fourteenth Amendment. However, Brooks's amended complaint requested relief under the Fourteenth Amendment and later stated that Sheriff Howell and his deputies "caused the Plaintiff to suffer . . . damages for economic losses in the form of loss of wages . . . for which the Plaintiff is entitled to recover." Not surprisingly, the lower court recognized this contention as a due process claim for deprivation of wages. Such recognition was proper.

liable for the deprivations in their individual capacities; because the jury found the deprivations to be part of a policy or custom, Sheriff Howell and Deputy Miller were also liable in their official capacities.[5]

Appellants raise a number of defenses. They contend that Brooks has not alleged the deprivation of a cognizable property right, that qualified immunity shields Sheriff Howell and Deputy Miller from liability in their individual capacities and that no custom was present to give rise to official liability under *Monell*. Appellants also maintain that post-deprivation remedies are adequate process for Brooks because whatever deprivation that allegedly occurred was merely a random and unauthorized act under the *Parratt/Hudson* doctrine. Consideration of these defenses leads us to affirm judgment on the Fourteenth Amendment claim only as to Sheriff Howell in both his individual and official capacities.

a. Brooks's Property Right

Since the United States Constitution does not create property rights, Brooks must be able to rely on Mississippi law to prove that he has a cognizable property right in wages for work performed as a pretrial detainee. *Garcia v. Reeves County, Texas*, 32 F.3d 200, 203 (5th Cir.1994). Where there is a "legitimate expectation of entitlement," there is a property right. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972).

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[5] The District Court amended its final judgment to include George County as result of the finding of official capacity liability.

Brooks contended below that Miss.Code Ann. §§ 47-1-13 and 47-1-21 (1972) created a property right in wages for work on public and private property as a pretrial detainee. Miss.Code Ann. § 47-1-13 states in relevant part that

> Any person being held in the county jail in default of bail to await trial . . . may on application to the sheriff of the county, be allowed to work on . . . county public works *as other convicts are worked and at the same wage.* The board of supervisors shall settle with prisoners so working at their regular meetings monthly.

(emphasis added). Miss.Code Ann. § 47-1-21 requires that

> [t]he sheriff of each county shall keep a well bound alphabetical jail docket. In it he shall promptly enter under the proper initial the name, age, color and sex of each convict, the date of his or her commitment, each day worked on the county farm. . . .
>
> The sheriff shall submit his docket to the board of supervisors at each of their regular meetings, and the same shall be examined carefully by the president of the board, and by any other members who desire to examine the same, in the presence of the board while in session.

The statutes cited by Brooks do not create a legitimate expectation of entitlement to compensation for work on private property by pretrial detainees. These statutes do not provide for payments for work on *private* property. In fact, under Mississippi law, prisoners may only do work of an "exclusively public character." *See* Miss.Code Ann. §§ 47-1-19, 47-1-3. We therefore find that Brooks's failure to receive compensation for his work on private

property over and above the compensation he actually received does not constitute a deprivation of a cognizable property right.

The two provisions quoted above, in our estimation, do create a legitimate expectation of entitlement to compensation for work on public property by pretrial detainees. These two statutes provide that a pretrial detainee who is permitted to work on public property must be paid the same wages as other prisoners. They place on the sheriff the duty to keep a record of days worked and to submit that information to the county board of supervisors so that the board can "settle" with the pretrial detainees at its regular meetings. Our conclusion that these statutes create a cognizable property right in wages is buttressed by the fact that the state has provided a mechanism whereby claims against the county can be presented directly to the board of supervisors or in state court.[6] Because Mississippi law creates a cognizable property right in wages for a pretrial detainee's work on public property, Brooks cannot be deprived of that right without due process of law. *See Piatt v. MacDougall*, 773 F.2d 1032, 1036 (9th Cir.1985) (en banc) ("Because Arizona has established, by statute, a right of inmates to compensation for work performed for private parties, it cannot deny [the inmate] that right

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[6] Under Miss.Code Ann. §§ 19-13-27 and 19-13-29, a claimant against a county can present such claim for unpaid work to the county board of supervisors. "If the board shall reject any such claim in whole or in part, or refuse when requested at a proper time, to pass thereon, the claimant may appeal to the Circuit Court, or may bring suit against the county on any such claim." Miss.Code.Ann. § 19-13-31.

after he has earned the wages, without affording him due process of the law.").

Sheriff Howell did not keep a record of the days Brooks worked on public property and failed to present such a record to the board of supervisors at its meetings, precluding the board of supervisors from paying wages to Brooks. Brooks was thus deprived of wages for the work he performed on public property as a direct consequence of Sheriff Howell's failure to act in the face of a clear duty to act under state law. The statutes cited by Brooks, however, do not impose on Deputy Miller a similar duty. Because the record provides no evidence that Deputy Miller's actions or failure to act deprived Brooks of wages for the work he performed on public property, we reverse the judgment holding Deputy Miller liable in his individual or official capacities on this claim.[7]

b. Sheriff Howell's Qualified Immunity

We now consider whether Sheriff Howell is qualifiedly immune from liability in his individual capacity. Qualified immunity is only available when an official acts "within the scope of [his or her] discretionary authority." *Cronen v. Texas Dept. of Human Services*, 977 F.2d 934, 939 (5th Cir.1992). Mississippi law, as quoted above, imposes on Sheriff Howell a non-discretionary duty to keep

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[7] Appellants would have us release Deputy Sheriff James Cooper from liability on the Fourteenth Amendment claim. As is visible from the Special Interrogatories, the jury never found Cooper liable on the Fourteenth Amendment claim. We note that Cooper would be free of liability anyway for the same reasons that absolve Deputy Miller.

records of work performed by pretrial detainees and to transmit those records to the board of supervisors so that pretrial detainees can be paid. Sheriff Howell thus is not entitled to qualified immunity from individual liability on this due process claim.

c. Official Capacity Liability Under *Monell*

Brooks's suit against Sheriff Howell in his official capacity is treated as a claim against George County. *Hafer v. Melo*, 502 U.S. 21, 23-27, 112 S.Ct. 358, 361-362, 116 L.Ed.2d 301 (1992). To establish liability on the part of George County, Brooks must demonstrate a policy or custom which caused the alleged constitutional deprivation. *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658, 690-91, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978). Appellants contend no such policy is present. However, the jury found that the Fourteenth Amendment violations were part of a custom, policy or practice of the county. This finding has sufficient support in law and fact.

We note that even "a single decision may create municipal liability *if* that decision were made by a final policymaker responsible for that activity." *Brown v. Bryan County, Oklahoma*, 67 F.3d 1174, 1183 (5th Cir.1995) (emphasis in original). Sheriffs in Mississippi are final policymakers with respect to all law enforcement decisions made within their counties. *Huddleston v. Shirley*, 787 F.Supp. 109, 112 (N.D.Miss.1992); Miss.Code Ann. § 19-25-1, *et seq*. Sheriff Howell admitted on the record that the department kept none of the required records detailing the locations and number of days prisoners worked. The jury could infer from this statement that the

county had a policy of not keeping such records. Therefore, George County is liable for the ongoing actions of its policy maker, Sheriff Howell, in depriving Brooks of his property without due process. *Turner v. Upton County*, 915 F.2d 133, 137 (5th Cir.1990), *cert. denied* 498 U.S. 1069, 111 S.Ct. 788, 112 L.Ed.2d 850 (1991).

d. Application of the *Parratt/Hudson* Doctrine

Appellants urge in their defense that no due process violation has been shown because of the *Parratt/Hudson* doctrine. Under their version of this doctrine, the mere presence of post-deprivation remedies prevents a due process claim.[8] Such interpretation is blatantly misleading and is not the law. The *Parratt/Hudson* doctrine dictates that a state actor's *random and unauthorized deprivation* of a plaintiff's property does not result in a violation of procedural due process rights if the state provides an adequate post-deprivation remedy. *Caine v. Hardy*, 943 F.2d 1406, 1412 (5th Cir.1991) (en banc) (discussing *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) and *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984)).

The *Parratt/Hudson* doctrine is inapplicable to the facts as shown. The doctrine is meant to protect the state from liability for failing to provide predeprivation process in situations where it cannot anticipate the need for such process (when actions are random and unauthorized). *Zinermon v. Burch*, 494 U.S. 113, 128-32,

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[8] *See* footnote 6 *supra* (submission of claims against counties).

110 S.Ct. 975, 984-87, 108 L.Ed.2d 100 (1990). Where a municipal officer operates *pursuant to a local custom or procedure*, the *Parratt/Hudson* doctrine is inapposite: actions in accordance with an "official policy" under Monell can hardly be labeled "random and unauthorized." *Wilson v. Civil Town of Clayton, Ind.*, 839 F.2d 375, 380 (7th Cir.1988). As this Court noted, where employees are acting in accord with customary procedures, the "random and unauthorized" element required for the application of the *Parratt/Hudson* doctrine is simply not met. *Alexander v. Ieyoub*, 62 F.3d 709, 713 (5th Cir.1995). Despite Appellants' urging, we see no application of the *Parratt/Hudson* doctrine to the facts as presented.

Accordingly, we affirm the judgment holding Sheriff Howell liable in his individual and official capacities on this Fourteenth Amendment claim relating to Brooks's work on public property. We do, however, remand to the district court for a retrial to determine the actual damages and punitive damages, if any, arising from Sheriff Howell's liability on this claim.[9]

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[9] Appellants have raised an important evidentiary concern which we must address. The district court denied Appellants' motion in limine to exclude evidence of the mistaken nature of Brooks's confinement. The record is replete with Brooks's references to the order of dismissal and subsequent mistaken confinement for several months. The mistaken nature of the confinement was only relevant to Brooks's unlawful incarceration claim for which the court granted summary judgment for the Appellants. The mistaken nature of the confinement is of little or no relevance to Brooks's surviving Fourteenth Amendment claim for deprivation of property and is likely prejudicial to the defendants. The lower court should thus

B. Fourth Amendment Claims – Unlawful Seizure

Brooks cross-appeals the summary judgments against him on his claims based on unlawful confinement under the Fourth Amendment.[10] All defendants were sued in both official and individual capacities under 42 U.S.C. § 1983. We review de novo the district court's decision to grant summary judgment in favor of Appellants. For the reasons discussed below, we affirm the grant of summary judgment against Brooks.

Brooks argues that his continued incarceration after the nolle prosequi order was a violation of the Fourth Amendment. The court granted summary judgment in

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allow no evidence (including the nolle prosequi order itself) of the *mistaken* nature of the confinement to go before the jury in their consideration of damages on the Fourteenth Amendment claim. With regard to Brooks's status, the jury is entitled only to know that Brooks was in the county jail as a pretrial detainee and that he was released when the charges against him were dismissed.

[10] Brooks appeals the summary judgment for all Cross-Appellees on the Fourth Amendment claims. Brooks does not appeal the summary judgment against him on his Eighth Amendment claim or on any of his claims against Public Defender William T. Bailey. Additionally, we note that Brooks nowhere in his brief questions the partial grant of summary judgment for the George County Board of Supervisors on immunity grounds, or for the Sheriff or his deputies on the Fourteenth Amendment claim with regard to deprivation of *liberty*. Accordingly, we will not address those portions of the summary judgment, any argument as to their propriety having been waived by Brooks.

favor of all Cross-Appellees.[11] As the lower court noted, Fourth Amendment claims are appropriate when the complaint contests the method or basis of the arrest and seizure of a person. Yet Brooks did not challenge his arrest, which was made pursuant to a valid capias, as a violation of the Fourth Amendment, but challenged only his continued incarceration.

We reference our decision in *Valencia v. Wiggins*, 981 F.2d 1440, 1449 (5th Cir.), *cert. denied* 509 U.S. 905, 113 S.Ct. 2998, 125 L.Ed.2d 691 (1993), by analogy, for the proposition that once the incidents of a valid arrest have long since been completed and the pretrial detainee remains in detention, the Fourth Amendment no longer applies when the challenge is solely to continued incarceration. In *Valencia*, this Circuit held that neither the Unreasonable Search and Seizure Clause of the Fourth Amendment nor the Cruel and Unusual Punishment Clause of the Eighth Amendment is applicable in determining whether a detention official's use of deliberate force was excessive. *Id.* The Due Process Clause of the Fifth and Fourteenth Amendments are the appropriate constitutional provisions for this determination. *Id.*

As the Court stated,

> We do not believe that the Fourth Amendment provides an appropriate constitutional basis for protecting against deliberate official uses of

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[11] Cross-Appellees on the Fourth Amendment claim are George County, Sheriff Howell, his three deputies, the George County Board of Supervisors, District Attorney Earl Koskela and Circuit Clerk Wilbur G. Ward.

> force occurring, as in this case, *after* the incidents of arrest are completed, *after* the plaintiff has been released from the arresting officer's custody and *after* the plaintiff has been in detention awaiting trial for a significant period of time . . . As the Fourth Amendment protects against unreasonable "seizures," it seems primarily directed to the *initial* act of restraining an individual's liberty, such as an investigatory stop or arrest.

Id. at 1443-1444.

The logic of *Valencia* applies to the instant case. The Fourth Amendment is inapplicable to a pretrial detainee who was properly arrested and is awaiting trial. That detainee has recourse to due process protections, not protection against unreasonable seizures after a lawful seizure has occurred. Since Brooks has shown no defect in his actual arrest, he has made no claim under the Fourth Amendment.[12] We affirm the summary judgment for the

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[12] Brooks's brief does not address his arrest but we do so here to show the lack of basis for Brooks's Fourth Amendment claim. Brooks was arrested in Virginia pursuant to a notice placed with the National Criminal Information Center (NCIC) after an affidavit was presented against him for grand larceny. Brooks waived extradition and was returned to Mississippi by Sheriff Howell on January 21, 1991. He was served with the capias for indictments issued in October, 1990 for cause numbers 3657 and 3658. He appeared before the judge for his initial appearance on these charges on January 28, 1991 and pled not guilty. NCIC printouts provide a reliable basis for probable cause to arrest. *U.S. v. McDonald*, 606 F.2d 552, 552-54 (5th Cir.1979). Therefore, there is no support for Brooks's claim that his arrest violated the Fourth Amendment guarantees against unreasonable searches and seizures.

Cross-Appellees on Brooks's Fourth Amendment claims.[13]

C. Dismissal of Claims Against the D.A. and the Clerk

Brooks also challenges the lower court's holding that District Attorney Koskela and Circuit Clerk Ward were not subject to suit on any of the constitutional claims discussed above.[14] As with the Fourth Amendment claim above, we hold that the district court properly granted summary judgment.

1. The District Attorney

Brooks's claims against Earl Koskela, the George County District Attorney, stem from Koskela's failure to provide a copy of the nolle prosequi motion to opposing counsel. Mississippi Uniform Circuit Court Rule 2.01 (1994) required that "[a] copy of all subsequent pleadings and motions, including motions for a new trial, shall be

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[13] As we agree with the District Court that Brooks presented no Fourth Amendment claim, we do not reach the arguments on immunity and level of conduct advanced at length by Cross-Appellees on this claim.

[14] This immunity analysis applies to Koskela's and Ward's potential liability under any of Brooks's claims. Because we have already shown above that Brooks's claims under the Fourth and Thirteenth Amendments were without merit, however, this immunity analysis is germane only to Brooks's claim under the Fourteenth Amendment for deprivation of liberty.

delivered in person or by mail to opposing counsel . . . "[15] Brooks contends that the district attorney's office, through Gary S. Evans, assistant district attorney, violated this rule, leading to his unconstitutional imprisonment for eight months. At the summary judgment phase, the district court dismissed all claims against Koskela in his individual capacity on the basis of prosecutorial immunity and in his official capacity under the Eleventh Amendment on the basis of his status as a state official in Mississippi. We find summary judgment appropriate in this context.

This Court is uncertain whether Brooks has even alleged a violation of Rule 2.01. Mr. Evans merely prepared an order of dismissal for the state trial court after acknowledging in open court that the case would not proceed. The district attorney's office had no duty under Rule 2.01 or, as far as we can discern, under any Mississippi law, to provide copies of the *court's* orders to opposing counsel.

Even if one assumed that the procedure resulting in a court order amounted to a "motion," Mr. Evans provided notice on or about January 28 or 29, 1991, of the government's intention to seek dismissal to Mr. Brooks's attorney, William T. Bailey, prior to the open court procedure.[16] Thus we are not convinced that if the nolle

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[15] This rule has been amended and recodified as Uniform Circuit and County Court Rule 2.06, Service of Copies and Certificate of Service.

[16] Mr. Bailey claimed that he no longer represented Brooks at the time of the nolle prosequi order. However, we agree with the district court that Bailey was still Brooks's attorney for the

prosequi procedure was subject to Rule 2.01's requirements that the district attorney's office even violated the rule.

Assuming *arguendo* that the district attorney violated Rule 2.01, we agree with the lower court that Koskela was nonetheless immune from such suit in his official and individual capacities. The district attorney is considered a state official in Mississippi, as the office is primarily state-funded, and the district attorney has the power to represent the state in all judicial proceedings. *Chrissy F. by Medley v. Mississippi Dep't of Public Welfare*, 925 F.2d 844, 849 (5th Cir.1991). As a state actor, the district attorney is shielded in his official capacity by Eleventh Amendment immunity. *Id.* No suit against Koskela in his official capacity can be maintained.

Koskela is also immune from suit in his individual capacity. Immunity is sustained for acts taken in furtherance of the prosecution of the case; acts which are investigative or administrative do not carry absolute

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purposes of establishing notice of the order. Bailey, assigned to represent indigent defendants such as Brooks, never received court permission to withdraw from representation of Brooks as required under Rule 1.05 of the Uniform Criminal Rules of Circuit Court Practice (1994). Bailey signed a document acknowledging receipt of discovery from the State on behalf of Brooks. Brooks himself advised the court at the arraignment on January 28, 1991 that he had an attorney. At roughly the same time, the government gave its notice to Bailey that the case would not proceed. It is not surprising that all involved except for Bailey himself believed that Bailey was Brooks's lawyer. Thus, the district court properly concluded that "Bailey, in his capacity as public defender, was acting as Brooks's attorney for the duration of the case."

immunity. *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S.Ct. 984, 994-95, 47 L.Ed.2d 128 (1976). Immunity is gauged by the functional activities the prosecutor engaged in and not the status of the defendant. *Briscoe v. LaHue*, 460 U.S. 325, 342, 103 S.Ct. 1108, 1119, 75 L.Ed.2d 96 (1983). Actions which are related to the judicial process fulfill the prosecutor's "advocatory" function and are considered absolutely immune from suit. *See Marrero v. City of Hialeah*, 625 F.2d 499, 505 (5th Cir.1980), *cert. denied* 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981).

In our estimation, the prosecutor's acts through his assistant of requesting that the court enter an order of nolle prosequi of Brooks's criminal charges, of having an order prepared for the court that memorialized the same, and the forwarding of such order to the clerk for filing are all prosecutorial activities "intimately associated with the *judicial* phase of the criminal process." *Imbler*, 424 U.S. at 430, 96 S.Ct. at 995 (emphasis added). The mere fact that the district attorney's office prepared the court's order for it and forwarded the order does not remove these acts from being intimately associated with the judicial process. Accordingly, we affirm the District Court's holding that Mr. Koskela is immune from suit under 42 U.S.C. § 1983 in both official and individual capacities on all claims brought by Mr. Brooks.[17]

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[17] Holding that the district attorney is protected by absolute immunity in both official and individual capacities, we do not reach the issue of Cross-Appellees' qualified immunity.

2. The Circuit Clerk of George County

Wilbur G. Ward was the Circuit Clerk for George County at the time of the incidents which are the subject of this lawsuit. The record indicates that the order of nolle prosequi was filed by Angela Cooper, over the file stamp which indicated that Wilbur Ward was the Circuit Clerk. Brooks alleges that Ward created a policy which had the effect of depriving him of the right to be free from unnecessary restraint by failing to send court orders of dismissal of charges to the defendant in a criminal prosecution, or to his counsel, and failing to adopt a policy for the George County Clerk's office of sending orders. The district court granted summary judgment in favor of Wilbur G. Ward, circuit clerk of George County, Mississippi ("the clerk"), based on the fact that the judge, not the clerk, was the final policymaker of the circuit county system in George County with regard to the acts alleged by Brooks. We agree.

Under Mississippi law, the judge is the ultimate authority for the supervision of the court in his jurisdiction. As the Mississippi Supreme Court stated, "Although the clerk performs the physical act of record keeping, the judge is ultimately responsible for the administration of his court." *In re Collins,* 524 So.2d 553, 555 (Miss.1987). Only those officials who have "final policymaking authority" may by their actions subject the government to liability under 42 U.S.C. § 1983. *Bryan Cty.,* 67 F.3d at 1182. Accordingly, Ward cannot be liable for failing to

establish a policy of sending orders to parties in a criminal proceeding because he was not the policymaker for the George County Circuit Court System.[18]

We also note that nowhere has Brooks shown that circuit clerks have an affirmative duty under Mississippi law to provide the sheriffs of the state, or counsel for criminal defendants, or criminal defendants pro se, with copies of orders or pleadings filed in criminal cases. Nor has Brooks shown an affirmative duty to notify sheriffs, counsel or defendants of the filing and entry of orders and pleadings in criminal cases. The circuit clerks merely have a duty to file and docket all papers filed in each court case.[19]

Since "no duty to act existed, the failure to act did not violate the constitution." *Salas v. Carpenter,* 980 F.2d

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[18] Brooks makes much of the fact that Ward held the position of Circuit Court Administrator of George County. The Court Administrator performs nonjudicial tasks of the court, serves as a liaison to the general public, and provides administrative support for all judges of the district. Miss.Code Ann. § 9-17-3 (1972). We find Brooks's reference to this fact deceptive. Appellants astutely advert to the fact Ward did not become Administrator until July, 1992, almost ten months *after* Brooks was released from jail. Ward's appointment to this position after Brooks's release is hardly relevant to the question of whether Ward was the court's policy maker at the time of Brooks's incarceration.

[19] *E.g.,* Miss.Code Ann. § 9-7-171 (1972) (duty of circuit clerk to keep a "general docket"); Miss.Code Ann. § 9-7-175 (1972) (duty to keep a "criminal docket"); Miss.Code Ann. § 9-7-177 (1972) (duty to keep an "appearance docket").

299, 307 (5th Cir.1992).[20] While it is unfortunate that Brooks languished in the county jail, we can find no duty violated by the clerk to impose liability for the loss. The district court properly granted summary judgment on this issue.

Conclusion

Libertas inestimabilis res est. The spirit of this adage is that one can place no price on freedom. Brooks fell through the cracks of a modern bureaucratic labyrinth, resulting in eight months of mistaken confinement. Nevertheless, we are unable to provide a remedy under 42 U.S.C. § 1983 to Brooks for this mistaken confinement. Brooks is entitled to a remedy, however, for the deprivation of his property – the wages earned as a pretrial detainee on public property – without due process of law. Nothing will shield Sheriff Howell or George County from liability for Sheriff Howell's failure to keep, and submit to the board of supervisors for payment, records of Brooks's work on public property as a pretrial detainee.

Holding that Brooks's involuntary servitude claim is without merit under the Thirteenth Amendment, we VACATE the judgments of the court below and RENDER judgment for Appellants. We also VACATE the judgment of the court below and RENDER judgment for Deputy Miller in both his individual and official capacities on

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[20] Because we hold that the circuit clerk was not a policymaker and did not violate any duty, we do not reach the issue of the clerk's qualified immunity.

Brooks's Fourteenth Amendment deprivation of property claim. We AFFIRM the judgment holding Sheriff Howell liable in his individual and official capacities under the Fourteenth Amendment for deprivation of property solely as it relates to Brooks's claim for wages for work on *public* property. However, we REMAND to the district court for a retrial to determine the actual damages, and punitive damages, if any, arising from Sheriff Howell's liability for depriving Brooks of wages for his work on *public* property. We also AFFIRM the district court's summary judgment for all Cross-Appellees on Brooks's constitutional claims regarding unlawful incarceration and for District Attorney Koskela and Circuit Clerk Ward on the dismissal of all claims against them.

No. 96-267

Supreme Court, U.S.
FILED
SEP 16 1996
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ROBERT W. BROOKS,
Petitioner,

v.

GEORGE COUNTY, MISSISSIPPI;
EUGENE HOWELL, Individually and in His Official Capacity as Sheriff of George County, Mississippi;
EARL KOSKELA Individually and in His Official Capacity as District Attorney; WILBUR WARD, Individually and in His Official Capacity as Circuit Clerk of George County Mississippi;
DON PARIMON, JAMES COOPER AND GEORGE MILLER, Individually and in Their Official Capacities as Deputy Sheriffs of George County, Mississippi;
BOARD OF SUPERVISORS OF GEORGE COUNTY, MISSISSIPPI, BEING NORMAN SEDRICK HOWELL, LARRY HAVARD, RALPH FAIRLEY, R. WAYNE CHRISTIAN AND CLYDE W. EUBANKS, SR., Individually and in Their Official Capacities as Supervisors for George County, Mississippi;
UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation; and UNITED FIRE CASUALTY COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF INTERESTED PARTIES

The undersigned counsel of record for George County, Mississippi, Eugene Howell, Sheriff of George County, Mississippi, James Cooper and George Miller, Deputy Sheriffs of George County, Mississippi, and the George County Board of Supervisors, certify that the following listed persons or entities have an interest in the outcome of this case.

1. Robert W. Brooks, Appellee and Cross-Appellant

2. George County, Mississippi, Appellant and Cross-Appellee

3. Eugene Howell, Sheriff of George County, Mississippi, Appellant and Cross-Appellee

4. James Cooper, Deputy Sheriff of George County, Mississippi, Appellant and Cross-Appellee

5. George Miller, Deputy Sheriff of George County, Mississippi, Appellant and Cross-Appellee

6. Don Parimon, Deputy Sheriff of George County, Mississippi, Cross-Appellee

7. Earl Koskela, District Attorney, Nineteenth Judicial District, Cross-Appellee

8. Wilbur Ward, Circuit Clerk of George County, Mississippi, Cross-Appellee

9. William T. Bailey, Sr., Cross-Appellee

10. Board of Supervisors of George County, Mississippi, Cross-Appellee

11. Larry Havard, Member, Board of Supervisors of George County, Mississippi, Cross-Appellee

12. Norman Sedrick Howell, Member, Board of Supervisors of George County, Mississippi, Cross-Appellee

13. Ralph Fairly, Member, Board of Supervisors of George County, Mississippi, Cross-Appellee

14. R. Wayne Christian, Member, Board of Supervisors of George County, Mississippi, Cross-Appellee

15. Clyde W. Eubanks, Sr., Member, Board of Supervisors of George County, Mississippi, Cross-Appellee

16. United States Fidelity and Guaranty Company, Cross-Appellee

17. United Fire and Casualty Company, Cross-Appellee

18. David C. Frazier, attorney for Robert W. Brooks

19. David A. Roberts, attorney for Robert W. Brooks

20. Roy W. Pike, attorney for Robert W. Brooks

21. Dan H. Fairly, Walter D. Willson and Wells Marble & Hurst, attorneys for George County, Mississippi, Eugene Howell, James Cooper, George Miller and Don Parimon

22. Gerald A. Dickerson, attorney for Board of Supervisors of George County, Mississippi

23. Geoffrey Morgan, attorney for Earl Koskela and Wilbur Ward

24. American Justice Insurance Reciprocal

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Statement of Jurisdiction

The district court had subject matter jurisdiction of this matter, pursuant to 28 U.S.C. §1331, inasmuch as the claims and cause of action arose under and pursuant to the laws of the United States, specifically, 42 U.S.C. §1983. The United States Court of Appeals for the Fifth Circuit had jurisdiction of the appeal pursuant to 28 U.S.C. §1291, since a final judgment and an amended final judgment were entered on June 20, 1994, and July 7, 1994, respectively. This Court has jurisdiction to entertain the instant petition for writ of certiorari pursuant to 28 U.S.C. §1254(1).

Statement of the Case

Robert W. Brooks (Brooks) was initially indicted by a grand jury of George County, Mississippi on October 29, 1990, for the separate offenses of grand larceny and felony burglary.[1] At the time the indictments were returned and the capias issued for his arrest, Brooks, out on bond, had fled the state of Mississippi and was located in Virginia. Brooks was thereafter arrested by law enforcement authorities in the state of Virginia who notified the George County, Mississippi Sheriff's office of his arrest. Between the indictments and his arrest, another felony warrant issued for Brooks on the charge of automobile theft. (R.Vol.IXp.422). Eugene Howell, Sheriff of George County, Mississippi (Sheriff Howell), traveled to the state of

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[1]Brooks had previously pled guilty to felony burglary on December 9, 1986, in the state of Virginia, as a result of which he was sentenced to three years in prison. (R.Vol.IIp.427).

Virginia and arrested Brooks on the auto theft charge, and returned him to the state of Mississippi. (R.Vol.IXp.422-423). On January 21, 1991, Brooks was incarcerated in the George County jail. (R.Vol.VIIIp.168). Brooks was arraigned on the indictments for grand larceny and felony burglary on January 28, 1991. (R.Vol.VIp.1580-1582;Vol.IXp.430).

Without notice to anyone, on February 4, 1991, by order of the Circuit Court of George County, the two felony indictments returned against Brooks were dismissed by an order of nolle prosequi. The order of nolle prosequi was presented to the court by the Assistant District Attorney, Gary Evans, and was executed by Circuit Judge Clinton E. Lockard. (R.Vol.IXp.431). This transaction took place in Judge Lockard's chambers in Jackson County, Mississippi. The order was then transmitted to the Circuit Clerk of George County and placed in Brooks' court file. (R.Vol.IXp.432). Brooks was not notified of the order of nolle prosequi; nor were Sheriff Howell or his Deputies. (R.Vol.IXp.436,432). Brooks discovered the entry of the order while perusing his court file on October 1, 1991. (R.Vol.Xp.607). Brooks presented a copy of the order to Sheriff Howell, who immediately released him from jail. (R.Vol.Xp.607).

In March, 1991, during the time period in which he was confined in the George County jail, Brooks requested and was granted trusty status. (R.Vol.IXp.442,608). Brooks specifically asked that he be made a trusty. (R.Vol.Xp.689). As a trusty, Brooks was not locked down in his cell, but was, instead, allowed the freedom to roam in and out of his cell, Sheriff Howell's office, the jail, and the surrounding grounds area. (R.Vol.IXp.447). Brooks even used Sheriff Howell's

personal shower, not the shower in the common area used by other inmates. (R.Vol.VIIIp.280). While incarcerated, Brooks performed, at his own request, various services for Sheriff Howell, George County and others, including several charitable or benevolent organizations, such as the Red Cross, a local VFW Post, an area Little League ballpark, and the George County Community Work Center, among others. (R.Vol.IXp.492;Vol.Xp.612,620). Brooks performed these services on public property as well as private property. Brooks performed these services for two reasons. First and foremost, he was able to secure his release from jail during the day. (R.Vol.Xp.609). Secondly, Brooks earned extra money by working on the outside. (R.Vol.VIIIp.276). Brooks was not compensated for those services he performed on public property, but was, in several instances, paid money or received property and/or goods in exchange for those services he performed on private property. (R.Vol.VIIIp.275). The servitude of Brooks on each and every occasion, was entirely voluntary and was accomplished at his own request in order to secure his release from confinement. (R.Vol.Xp.688-689,694-695).

Shortly after his release from confinement, Brooks filed a complaint in the United States District Court for the Southern District of Mississippi, Southern Division, on July 1, 1992, alleging various and sundry violations of his civil rights, seeking $6,500,000 in damages. (R.Vol.Ip.1). During the discovery phase, Brooks filed an amended complaint on March 29, 1993, adding several additional parties and increasing the amount he demanded to $17,000,000. (R.Vol.IIp.392).

On motions for summary judgment filed by all parties, the lower court denied Brooks' motion for partial summary judgment in its entirety, but granted, in part, Respondents' motion for summary judgment with respect to Brooks' claim of unlawful incarceration, Brooks' pendent state law claims of negligence and false imprisonment, and Brooks' claim for punitive damages in Respondents' official capacities. (R.Vol.VI p.1608,1646).

After a five-day trial, the jury returned a verdict for Brooks on April 26, 1994, against Sheriff Howell, James Cooper and George Miller, Deputy Sheriffs of George County, (the Deputies), and George County, awarding compensatory damages in the amount of $70,000, $50,000 of which represented damages concerning Brooks' claim of involuntary servitude under the Thirteenth Amendment, and $20,000 representing lost wages in connection with Brooks' due process claim under the Fourteenth Amendment. (R.Vol.VIIp.1763). The following date, in a bifurcated proceeding, the jury awarded punitive damages against Sheriff Howell and Deputy Miller in their individual capacities in the amount of $5,000 and $500, respectively. (R.Vol.VIIp.1770). A judgment was entered against Sheriff Howell and his Deputies on June 20, 1994. (R.Vol.VIIp.1777). An amended judgment was thereafter entered on July 7, 1994, to include George County as a judgment debtor. (R.Vol.VIIp.1809).

Respondents timely filed a notice of appeal on September 6, 1994, thereby perfecting their appeal to the United States Court of Appeals for the Fifth Circuit. (R.Vol.VIIp.1926). Brooks then filed a cross-appeal with respect to the district court's granting of partial summary

judgment regarding his claim of unlawful incarceration, his pendent state law claims and punitive damages in Respondents' official capacities, and full summary judgment to the other litigants on each of Brooks' claims. (R.Vol.VIIp.1935).

This matter was argued orally before the Fifth Circuit on November 6, 1995. Several months later, the Fifth Circuit rendered its opinion, which reversed and rendered the jury award premised upon involuntary servitude under the Thirteenth Amendment, and reversed and rendered that portion of the jury award concerning work on private property under the Fourteenth Amendment. The Fifth Circuit affirmed the district court's granting of summary judgment on behalf of the Respondents on Brooks' claim of unlawful incarceration.

The opinion of the Fifth Circuit that gives rise to Brooks' petition for writ of certiorari is published at 84 F.3d 157 (5th Cir. 1996), and is reprinted in full in appendix A to Brooks' petition for writ of certiorari.

Argument

As this Court is well-aware, the granting of a writ of certiorari is not a matter of right, but is wholly discretionary and will be granted only where there are special and important reasons therefor. Sup.Ct.R. 10.1; Durham v. U.S., 91 S.Ct. 858, 860 (1971). The generally-accepted reasons for granting a petition for writ of certiorari include the following:

(a) a United States court of appeals has entered a decision in conflict with the decision

> of another United States court of appeals on the same important matter...;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup.Ct.R. 10.1.

A petition for a writ of certiorari is rarely, if ever, granted when the asserted error consists of nothing more than erroneous factual findings or the misapplication of a properly stated rule of law. This is the essence of Brooks' petition for writ of certiorari in this case. Indeed, Brooks has utterly failed, as will be more fully demonstrated hereinbelow, to demonstrate even a colorable conflict between the Fifth Circuit and an opinion of any other court of appeals or, for that matter, with any ruling of this Court. Furthermore, Brooks' contentions before this Court do not involve an important question of federal law, but, at best, involve nothing more than the interpretation of Mississippi statutory and common law, and whether a claim was stated thereunder.

In essence, Brooks is dissatisfied with the Fifth Circuit's opinion, which reversed and rendered most aspects of this case in Respondents' favor. Be that as it may, dissatisfaction with the Fifth Circuit's opinion does not warrant special review by the United States Supreme Court. Braxton v. U.S., 111 S.Ct. 1854, 1857 (1991).

I.

The Fifth Circuit's Opinion Does Not Conflict With the Decisions of Other Courts and/or The Thirteenth Amendment to the United States Constitution

Brooks' principal claim at trial and on appeal was that he was coerced or forced to work while incarcerated in the George County jail. Based upon this alleged compulsion, Brooks claimed that Respondents allegedly violated his Thirteenth Amendment right to be free from involuntary servitude. Having failed to secure relief below, Brooks now contends that the Fifth Circuit's opinion, as published at 84 F.3d 157 (5th Cir. 1996), directly conflicts with the Eighth Circuit's ruling in Bell v. Wolff, 496 F.2d 1252 (8th Cir. 1974), and is supposedly contrary to this Court's pronouncement in United States v. Kozminski, 108 S.Ct. 2751 (1988). (Pet. at 13). Moreover, Brooks contends that the Fifth Circuit's ruling concerning involuntary servitude is directly contrary to the Thirteenth Amendment to the United States Constitution. Id. at 13.

The Thirteenth Amendment to the United States Constitution provides that "[n]either slavery nor involuntary servitude, except as punishment for a crime whereof the party

shall have been duly convicted, shall exist within the states or in any place subject to their jurisdiction." U.S. Const., Amend XIII. The Fifth Circuit defines involuntary servitude as "an action by the master causing the servant to have, or to believe he has, no way to avoid continued service or confinement." Watson v. Graves, 909 F.2d 1549, 1552 (5th Cir. 1990). "When the employee has a choice, even though it is a painful one, there is no involuntary servitude. A showing of compulsion is thus a prerequisite to proof of involuntary servitude." Id. at 1552.[2] The definition of involuntary servitude articulated by the Fifth Circuit comports with that of other jurisdictions. See, e.g., Turner v. Unification Church, 473 F.Supp. 367 (D.C. R.I. 1978). Indeed, the Second Circuit utilizes an identical standard, defining involuntary servitude thusly:

> But a holding in involuntary servitude means to us action by the master causing the servant to have, or to believe he has, no way to avoid continued service or confinement, in Mr. Justice

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[2]Brooks contends that Watson is inapplicable since Brooks was a pretrial detainee and not a convicted felon. This is simply wrong. Those convicts sentenced to hard labor and those persons convicted under laws which allow for labor as a part the punishment lose their Thirteenth Amendment protection. Murray v. Miss. Dept. of Corrections, 911 F.2d 1167, 1168 (5th Cir. 1990); Plaisance v. Phelps, 845 F.2d 107, 108 (5th Cir. 1988); Wendt v. Lynaugh, 841 F.2d 619, 620-21 (5th Cir. 1988). Pretrial detainees have and retain the protection of the Thirteenth Amendment. Watson, although a convicted felon, was not sentenced to hard labor, and, therefore, retained his Thirteenth Amendment rights. Watson, 909 F.2d at 1552. Therefore, for purposes of a Thirteenth Amendment analysis, Brooks and Watson are on equal footing, each protected under the cloak of the Thirteenth Amendment.

> Harlan's language, "superior and overpowering force, constantly present and threatening," [citation omitted] not a situation where the servant knows he has a choice between continued service and freedom, even if the master has led him to believe that the choice may entail consequences that are exceedingly bad.

United States v. Shackney, 333 F.2d 475, 486 (2d Cir. 1964). Undoubtedly, it is difficult to prove a true case of coercion or compulsion since, as this Court noted almost eighty years ago, involuntary servitude is considered to be "something akin to African slavery." Butler v. Perry, 36 S.Ct. 258, 259 (1916).

Brooks' contentions that the Fifth Circuit's ruling in this case and in Watson are contrary to Bell are misplaced. In fact, a good argument can be made that Bell is not even applicable to Brooks' claims.

Like Brooks, Bell claimed he was subjected to involuntary servitude, because he was, he claimed, compelled to work as a pretrial detainee. The warden offered to allow Bell to work rather than be placed in administrative segregation. The plaintiff was told he would not be paid for his work. Bell worked for a short period, then refused to obey a work order, and was placed in punitive segregation where he remained until his release. Id. at 1254. The appellate court affirmed the trial court's refusal to award the plaintiff damages. Id. at 1254.

The confusion over what Bell stands for is easily understood. The trial court in Bell found that Bell was not a true volunteer, based upon what he believed was a deficiency in the

work paper signed by the plaintiff. The warden did not appeal this finding, "a conclusion unchallenged by the defendant." Id. at 1254. Thus, from a precedential viewpoint, the case is meaningless because, on the issue of whether the facts constituted involuntary servitude, there was nothing before the court. While at first blush the case seems to say that mere confinement can be sufficient coercion, deeper analysis reveals something much different. For one thing, Bell was placed in administrative or punitive segregation. Brooks was never placed in administrative segregation or, as it is sometimes known, "solitary confinement." Moreover, it is important to note what was not before the court in Bell. The appellate court was not asked to review the record to determine whether there was sufficient evidence to constitute a Thirteenth Amendment violation. As stated, the court noted that the warden did not appeal that lower court finding. Additionally, this decision predated the standard-bearing qualified immunity decisions of Anderson v. Creighton, 107 S.Ct. 3034 (1987), Mitchell v. Forsythe, 105 S.Ct. 2806 (1985), and Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982).

If Bell impinges on the case at bar at all, it is more likely favorable to the Respondents. "With reference to the petitioner's charge the warden had forced him to work, . . . the record supports, that as a result of warden's conference with the petitioner, the warden reasonably believed the petitioner wished to work rather than remain idle." Id. at 1254. Much the same can be said of Sheriff Howell and his Deputies in this case.

Brooks compares his situation to that of the claimants in U.S. v. Kozminski, 108 S.Ct. 2751 (1988). In Kozminski, this Court affirmed the conviction of Kozminski, who was

charged with a violation of a federal criminal statute. However, the case reveals facts much more egregious than those presented by Brooks. Kozminski took two men in their 60s with intelligence quotients in the 60s and put them to work on his dairy farm. The men, who were paid little or nothing, were subjected to physical and verbal abuse. The defendant ordered the men not to leave the farm. On several occasions, the men did leave, were picked up and brought back. Kozminski isolated the victims from relatives, friends and even other farm-hands. Without proper food and nutrition, the men were found in poor health. They were forced to live in squalid conditions. Id. at 2755-2756. This factual scenario is diametrically opposite of that experienced by Brooks. Kozminski reveals facts the record in the instant case does not begin to approach.

It is intellectually dishonest to compare Brooks' situation to that of the victims in Kozminski. The plaintiffs in Kozminski were persons of less than normal intelligence who, in the autumn of their lives, were placed on a farm, subjected to physical and verbal abuse, were picked up and brought back when they left the farm, were isolated from their relatives, friends and other farm hands, were not properly fed or housed, and were forced to live in horrible conditions and poor health. Nothing even close to this was experienced by Brooks. As this Court noted in Kozminski, "we hold only that the jury must be instructed that compulsion of services by the use or threatened use of physical or legal coercion is a necessary incident of a condition of involuntary servitude." Id. at 2765. The Fifth Circuit's opinion in this case is far from contrary to this Court's ruling in Kozminski.

A review of the record in this case demonstrates that Brooks was never forced or compelled to do anything. The record is replete with instances where Brooks acknowledged that he requested to work and was not forced, ordered or compelled to work. For example, Brooks admitted on cross-examination that he requested to work in order to get outside:

Q Nobody in jail wants to be in jail, do they?
A Right, no, sir.
Q So the getting out is something that's done to make life easier for you, true?
A Yes, sir.

****

Q And that's what you asked for in this case, isn't it?
A I asked to get outside, yes, sir.
Q You wanted to be a trusty.
A Want to, yes, sir, get out of my cell.
Q All right. And you know-- you know enough about jails and the way things work in the jail that the sheriff isn't going to just let you out and let you just sit on the sidewalk, is he?
A No, sir.

****

Q Now, you testified earlier that your brother, Dale went to Mr. Cooper and asked him to let you get out and work some.
A Yes, sir.
Q Is that correct?
A Yes, sir.

Q Did you ask Mr. Cooper?
A Yes, sir. After Cooper come back there, he asked me did I-- he said, would you like to get out and do some work around here and I said, yes, sir.
Q Okay. Mr. Cooper didn't make you do that, did he?
A No, sir.
Q You wanted to do it, didn't you?
A Yes, sir, I wanted to get out of my cell.
Q And you wanted to get out and work.
A I wanted to get out of my cell, you know, if I had to work to do it, that's--
Q You were willing to do it.
Q Yes, sir. It wasn't that big of a deal to you.
A No, sir.

(R.Vol.Xp.688-689,694-695).

The above passages from Brooks' own testimony demonstrate that the evidence, at best, shows that Brooks, in a desire to obtain freedom from his cell, asked to perform tasks and jobs for Sheriff Howell and his Deputies. Given this testimony, there is no conceivable scenario under which Brooks could demonstrate the requisite force or compulsion required by Watson, Kozminski, or Shackney. Interestingly enough, Brooks' court-appointed attorney testified that Brooks told him he did not want to get out of jail, since Brooks presumably wanted to accrue time in county jail toward his expected prison sentence. Brooks' counsel, William Bailey, was so surprised by this announcement that he had Brooks put it in writing. (R.Vol.Xp.779; Ex. D-12). While Brooks denied that this

conversation took place, he did not dispute that the document in question (Ex. D-12), which bore the words, "Don't want to get out of jail," contained his signature. (R.Vol.Xp.698-700).

The position Brooks was in is no different from the plaintiffs in Watson. Brooks requested to be let out of his cell to do some work, sending his brother Dale, a fellow inmate, to Deputy Cooper as his intermediary.[3] (R.Vol.Xp.608,695). In Watson, "...both (plaintiffs) testified they requested work outside the jail and took work release whenever possible." Id. at 1552. On direct examination at trial, Brooks testified that he wanted to be a trusty and that he wanted to get outside. (R.Vol.Xp.609). The same was true for the plaintiffs in Watson. Brooks claimed, notwithstanding his acknowledgment and admission that he requested all of his work, that it was understood by him that, if he had not performed the labor, he would have been returned to his cell. ("If we didn't do the work, you know, I just had the basic understanding that I was going back to my cell." (R.Vol.Vp.720).

For this Court to fully appreciate the setting in which Brooks found himself, further examination of the record is necessary. Brooks was allowed freedoms and privileges broader and more liberal than any other inmate. Brooks took his showers in the Sheriff's personal shower, not in the ones used by the other inmates. (R.Vol.VIIIp.280). He would ride

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[3]Brooks' brother and alleged co-conspirator, Dale Brooks, had previously pled guilty to the offenses of felony burglary and grand larceny, and was in the George County jail awaiting sentencing and transfer to the state penitentiary at Parchman. (R.Vol.Vp.1228).

in a patrol car with narcotics agents while they were out working. (R.Vol.Xp.704). He would ride with Deputy Tanner while Tanner was out serving papers. (R.Vol.Xp.704-705). He even rode some with a Lucedale city policy officer, Ronnie Lambert. (R.Vol.Xp.705). Chief Deputy Miller and Brooks lifted weights together at a makeshift weight room at the old school superintendent's building across from courthouse. (R.Vol.IXp.376). Brooks "worked out" with weights two nights per week. (R.Vol.Xp.706). Brooks was later provided a key to the "weight room" so that he could, when Miller was unavailable, lifts weights on his own. (R.Vol.IXp.378). Miller loaned Brooks his radio so Brooks would have music while he was in his cell. (R.Vol.IXp.380-381). Brooks and Miller even went jogging together one time. (R.Vol.Xp.706).

The record is utterly silent as to any abuse, physical or otherwise, subjected on Brooks to make him work. Not once did Brooks imply or insinuate that physical, mental or emotional harm was done to him to encourage him to work. More to the point, Brooks never said that the Respondents slapped, kicked, beat or struck him. He did not say he was cursed or belittled. He does not claim that the Respondents mistreated him in any way. Nothing is present in the record to show that Brooks worked out of fear of abuse, mistreatment or physical or emotional pain. The record does not reveal that Brooks worked for any reason other than a personal desire to be outside his jail cell. On each occasion when asked about why he worked, Brooks stated that he did so because work gave him the opportunity to get out of the jail (e.g. "Q. Okay. Now from the standpoint of the cookout issues, why would you do this? A. So I could get out of jail". (R.Vol.Xp.621). "Q. All right.

Why would you want to be a trusty? A. To get out -- to get outside. I didn't like the jail." (R.Vol.Xp.609).

Brooks had a choice. He may not have found the options pleasant ones; nevertheless, he had a choice. Brooks could have simply stayed in jail had he not wanted to work. Brooks' decision to work was his own. Nothing these Respondents did or did not do motivated him to work. There was no substantial evidence upon which to arrive at any other conclusion, and the Fifth Circuit correctly so found. The above facts demonstrate one simple, clear concept. Brooks had as free a run of the George County jail as any outsider could imagine. He enjoyed freedoms and liberties not had by others. He took full advantage of all opportunities to gain freedom out of the jail. Given this, it is incomprehensible that this environment, this surrounding, this atmosphere could cause Brooks to believe he had no way to avoid continuing to work. Reasonable minds simply could not differ in this regard, and the Fifth Circuit properly so held.

It requires no citation of authority to state that, during his confinement, Brooks had only one right - to stay confined in his cell (absent release on bond and subject to certain constitutional restrictions not pertinent here). These Respondents were under no obligation to allow Brooks the freedoms he enjoyed. Moreover, Sheriff Howell was under no duty at all to afford Brooks the opportunity to work outside his cell. It offends and defies all notions of common sense to say that Brooks somehow had the right to be outside the jail when, as everyone believed, he was awaiting trial on two felony indictments. Brooks claims his treatment was tantamount to slavery because, he says, if he did not work, he would have been

placed in his cell. Such an argument presupposes that Brooks had some right superior to that had by all other persons arrested and awaiting trial. Implicit in Brooks' argument is that he had the right to be free and roam around when then the sole purpose of his being incarcerated there was to hold him until his trial. This was the only place he had the right to be. Sheriff Howell was not obliged to release Brooks or let him out of jail. Brooks, through his testimony, acknowledged this:

Q Let me see if I can say it where-- I think you and I will understand each other. The only-- you didn't have a right to be a trusty; do you agree with that?
A Yes, sir.
Q The only thing that you had the right to do was to stay in that cell. That's true, isn't it?
A Yes, sir.
Q That is, if you couldn't make bond. Do you agree with that?
A Yes, sir.
Q You know how this process works, if you're arrested you go to jail and your bond set and if you can make that bond then you get out, correct?
A Yes, sir.
Q So that your getting out of jail is something that's done as a favor to you. Do you agree with that?
A Yes, sir.

(R. Vol. X p. 687-688).

Brooks' counsel agreed that this was the only right Brooks had. "Unfortunately, the sheriff was absolutely right, he has a right to sit in jail or make a bond." (R.Vol.Xp.758). Indeed, release from jail to work is a decision contingent upon the discretion, and, to a large extent, the grace of the sheriff. Sheriff Howell could have elected to allow or disallow Brooks to work outside the jail under the authority of one or more statutes. For example, Miss. Code Ann. §47-1-13 (1972), provides that any person in jail awaiting trial for non-violent offenses may be allowed to work on county public works, if the sheriff deems it proper. The sheriff is not obligated, mandated, or required to allow a prisoner to work.

Admittedly, this case is complicated by the fact that during the time Brooks was out of jail working, no criminal charges existed. However, for purposes of a Thirteenth Amendment analysis, for purposes of determining whether Brooks was compelled to work, for purposes of deciding whether the facts of this case constitute involuntary servitude, it simply makes no difference. First, it is uncontradicted that no one holding Brooks, even Brooks himself, knew of the existence and entry of the order of nolle prosequi. The trial court so found. (R.Vol.VIp.1629). It would be unconscionable and patently unjust to hold Sheriff Howell accountable with the knowledge of the order when he had positively no notice of its entry. Second, the trial court ruled, in deciding the numerous motions for summary judgment, that Sheriff Howell had no legal liability to Brooks because of the entry of the order. (R.Vol.VIp.1627-1629). How, then, could this one factor, the entry of the order, convert this case from one not violative of the Thirteenth Amendment to one that is, when both courts below specifically held that the entry of the order imposed no

liability on the Respondents? To reverse the Fifth Circuit regarding the Thirteenth Amendment feature of this case, this Court will have to fashion a bizarre standard which would, not only violate fundamental notions of fair play, but would also violate sensible logic and basic human reasoning. This is not the intention or purpose of the Thirteenth Amendment. The Thirteenth Amendment proscribes a certain kind and type of conduct by public officials. The record does not reveal the force, compulsion or coercion necessary to support any such claims. Because of Brooks' failure to adduce any evidence at trial to support a claim under the Thirteenth Amendment, the Fifth Circuit correctly reversed and remanded this aspect of Brooks' claims.

That Brooks completely failed to present a case sufficient for the jury to consider is dramatically demonstrated by comparison to other cases. In Abbott v. Gould, Inc., 443 N.W.2d 591 (Neb. 1989), the court held it not to be involuntary servitude absent "the use or threat of physical force or legal coercion to extract labor from an unwilling worker." Id. at 596. There, employees claimed their employer intentionally deceived them into believing exposure to certain chemicals was not harmful when it actually was. The court rejected the plaintiffs' Thirteenth Amendment claim. Similarly, in United States v. Shackney, 333 F.2d 475 (2d Cir. 1964), the court held that an employer, who recruited Mexicans to work on his farm in Connecticut and threatened them unless they worked for an agreed period of time, was not guilty under a federal criminal statute incorporating the Thirteenth Amendment provisions. "While a credible threat of deportation may come close to the line, it still leaves the employee with a choice. . . ." Id. at 486.

The plaintiff in Turner v. Unification Church, 473 F.Supp. 367 (D.C. R.I. 1978), claimed that Reverend Moon induced her to join the church and then conspired to hold her in involuntary servitude. She alleged constant threats forced her to work more than 12 hours per day. The court rejected the plaintiff's claims saying, "It is unclear whether [18 U.S.C.] section 1853 should be expanded to include the type of involuntary servitude alleged in this case, namely psychological control or dominance over the servant. Involuntary servitude usually includes both elements of physical restraint and complete psychological domination." Id. at 375.

One vital, critical and essential element is lacking in the case presented by Brooks, as was present in Kozminski, supra, and Bell, supra. The record fails to reveal that Brooks did not desire to work, or that he refused or was unwilling to work, but was made to do so. Suppose, for example, Brooks had been in his cell early one morning and Sheriff Howell or one of his Deputies came to Brooks' cell to get him to work. Suppose further that Brooks, not willing to work, told the sheriff he would not work. Suppose further, the sheriff had advised Brooks that he could stay in his cell. (This is the feature of the case that, according to Brooks, triggers the Thirteenth Amendment violation.) Where does the compulsion arise? Where is it demonstrated? Had this very scenario occurred, which it did not, how could it be said that Brooks was compelled to do anything, except, possibly, remain in his cell?

Absent is any evidence that Sheriff Howell threatened to beat, kick, whip, kill or hurt Brooks to force him to work. There is no oral or documentary testimony or evidence which even intimates that the sheriff or any Respondent threatened

Brooks with isolation, administrative segregation, or to deny him food or water, or threatened a deprivation or punishment at all. Conspicuously silent from the record is any mention by any witness of any suggestion or innuendo to Brooks by one of the Respondents that, should he decline to work, he would suffer retribution, punishment or violence. The utter failure of the proof, including the absence of any coercion or compulsion, mandates that this Court deny Brooks' petition for writ of certiorari on the issue of whether the Fifth Circuit's opinion conflicts with an opinion of the Eighth Circuit or this Court.

II.

The Fifth Circuit Correctly Ruled That No Legitimately-Recognized Property Interest Protected By the Due Process Clause of the Fourteenth Amendment Exists for Consensual Work Performed on Private Property

The United States Constitution does not create property interests; consequently, Brooks must look to Mississippi law to determine whether a constitutionally-cognizable property interest in wages exists. Garcia v. Reeves County, Texas, 32 F.3d 200, 203 (5th Cir. 1994). The Mississippi Supreme Court had occasion to address this concept in Barrett v. Miller, 599 So.2d 559, 564 (Miss. 1992), wherein the court noted that 42 U.S.C. §1983 imposed liability "for the violation of rights protected by the Constitution, not for violations of duties of care arising out of tort law." Id. at 564. The court continued by noting that the remedy for violation of a duty of care must be sought in state court under traditional tort law principles. Id. at

564. The court concluded by reiterating the following well-settled proposition:

> While liability may be assessed under §1983 when the limits of privileged force are exceeded, the threshold for that liability is higher than that set for a normal tort action. Justice v. Dennis, 834 F.2d 380, 382 (4th Cir. 1987). A mere lack of care by a state official does not deprive an individual of life, liberty, or property under the Fourteenth Amendment and create liability under §1983.

Id. at 564. Simply put, if no federal rights are implicated, there is no basis for any action under 42 U.S.C. §1983. Clark v. Link, 855 F.2d 156, 161 (4th Cir. 1988)(a fundamental flaw often encountered is the assumption that a §1983 action may be based upon a violation of state law).

Brooks contended below that Miss. Code Ann. §47-1-13 (1972), provided the basis for his right to compensation for work on private property.[4] (R.Vol.VIp.1637). Along these lines, the lower court noted in its summary judgment opinion that Sheriff Howell had a

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[4]Brooks now cites Miss. Const. Art. 10 §226 in support of his position. Technically speaking, Brooks' contentions in this regard were not raised and/or argued at either the district court or Fifth Circuit level. As such, Brooks' arguments concerning any claim under the Mississippi Constitution for work performed on private property has been effectively waived or abandoned. Ellis v. Dixon, 75 S.Ct. 850, 852 (1955)(questions not raised in lower court proceedings were not open for consideration on petition for writ of certiorari).

statutory duty to keep a record of each prisoner and the days he worked, pursuant to Miss. Code Ann. §47-1-21 (Rev. 1993). (R.Vol.VIp.1634). Respondents submit that, even assuming Sheriff Howell violated the express terms of Miss. Code Ann. §47-1-13 (1972) and/or Miss. Code Ann. §47-1-21 (Rev. 1993), such violations do not establish or rise to the level of a constitutional deprivation, since neither statute allows and/or provides for a private cause of action. See, e.g., Davis v. Scherer, 104 S.Ct. 3012, 3018 (1984) (no legitimate property interest protected by the Fourteenth Amendment due process clause is created by state statute not providing for private avenue of redress). Couple that with the proposition that a violation of state law does not automatically amount to deprivation of a federal right, and it becomes readily apparent that Brooks failed to prove any constitutional transgression as a result of his working on private property based upon any possible violation of these statutes.

This aspect of Brooks' petition is further without merit in view of the fact that the due process clause of the Fourteenth Amendment is not implicated by a negligent or inadvertent act of an official which causes an unintended loss of or injury to life, liberty or property. Daniels v. Williams, 106 S.Ct. 662, 663 (1986). On the contrary, the focus of the due process clause is to curb deliberate abuses of government power.[5] Id. at 663. To hold that negligent inaction, inattention or acquiescence amounted to a constitutional deprivation within the meaning of

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[5]Sheriff Howell positively and unequivocally testified that he was not aware, at the time Brooks was working on private property, that such acts may violate state law. (R.Vol.IXp.473).

the Fourteenth Amendment would trivialize the centuries-old principle of due process of law. Id. at 667. Even "self-aggrandizing" or selfish motives are not actionable under the due process clause if no deliberate intent to harm exists. Buckey v. County of Los Angeles, 968 F.2d 791, 794 (9th Cir. 1992). In other words, the admission of Sheriff Howell and his Deputies that Brooks worked on private property, at Brooks' own request, even if to enhance or bolster Respondents' own financial or personal gain, is not the kind of conduct the Fourteenth Amendment was designed to prevent. (R.Vol.IXp.473).

The evidence is uncontroverted that Sheriff Howell and his Deputies did not know that it may violate state law to allow inmates to work consensually on private property. (R.Vol.IXp.473). The evidence is equally undisputed that no one, at any time, forced Brooks to work or do anything other than stay in his cell to await his trial. Even assuming that Respondents committed some tort cognizable under state law, it does not rise to the level of a violation of the due process clause merely because Sheriff Howell and his Deputies were state officials. Baker v. McCollan, 99 S.Ct. 2689, 2695-96 (1979). The due process clause is simply not implicated by a state actor's unintended or negligent deprivation of a pretrial detainee's property interests. Davidson v. Cannon, 106 S.Ct. 668, 670 (1986). As such, many types of harm or injury, though caused by a state actor, do not fall within the scope of 42 U.S.C. §1983, inasmuch as §1983 "does not turn the Fourteenth Amendment into a font of tort law that supersedes the tort systems already available under individual state laws." Gregory v. City of Rogers, Arkansas, 974 F.2d 1006, 1009 (8th Cir. 1992). More importantly, the due process clause of the

Fourteenth Amendment is not implicated by the lack of due care of a public official causing an unintended injury to life, liberty or property.[6] Id. at 1009; Daniels, 106 S.Ct. at 663.

In each instance, Brooks' claims are premised solely upon state law and/or a state statute, none of which provide any implied private cause of action in Brooks, as correctly noted by the Fifth Circuit. Regardless of whether Sheriff Howell and/or his Deputies (1) failed to keep a record of each prisoner and the days he worked; or (2) failed to pay Brooks' wages for work performed on private property, these acts, even if true, do not give rise to a private cause of action in Brooks, and, in particular, no statute gives Brooks a "right" to be paid for working on private property. Even assuming there did exist some right to compensation for consensual work on private property under Miss. Code Ann. §47-1-13 (1972), the failure to pay Brooks on a few of the jobs he performed does not create a constitutional deprivation. That is, if Brooks had some right to be paid for those services he performed on private property, that right was not one secured by the Constitution or laws of the United States within the meaning of 42 U.S.C. §1983. Borror v. White, 377 F.Supp. 181, 183 (W.D. Va.

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[6]In order to state a substantive due process claim under the Fourteenth Amendment, the "official's action must be such that it 'shocks the conscience,' or 'offends the community's sense of fair play and decency.'" Porter v. City of Detroit, 639 F.Supp. 589, 593 (E.D. Mich. 1986); see also, Rochin v. California, 72 S.Ct. 205 (1952). That is, only conduct which is clearly "outrageous" invokes the protections afforded by the due process clause. No act of Sheriff Howell or his Deputies amounts to shocking conduct, nor is it so patently offensive as to amount to a substantive due process deprivation under the Constitution, as the Fifth Circuit correctly held.

1974)(petitioner's right to payment for his services as barber was derived from the laws of the state of Virginia, and was not a right secured by the Constitution).

In order to rise to the level of a constitutional claim, the conduct of the public official or employee must be "sufficiently egregious as to be constitutionally tortious." Hull v. City of Duncanville, 678 F.2d 582, 584 (5th Cir. 1982)(§1983 imposes liability for violation of rights protected by the Constitution, not for violations of state tort or statutory law). Allowing a pretrial detainee to work on private property is patently innocuous from a constitutional standpoint and is, at most, a mere violation of state law. Clearly, no important question of federal law is involved in this aspect of Brooks' petition for writ of certiorari.

III.

The Fifth Circuit Correctly Held That Sheriff Howell Had No Duty Under Mississippi Law to Periodically Ascertain Brooks' Status as a Pretrial Detainee

Brooks contends that the Fifth Circuit incorrectly ruled that Sheriff Howell had no duty under state law to ascertain Brooks' status as a pretrial detainee, and that this is supposedly an "important question of federal law." (Pet. at 16). Specifically, Brooks contends that Miss. Code Ann. §47-1-21 (Rev. 1993), allegedly requires that Sheriff Howell "present for approval for hiring a pretrial detainee to the board of supervisors of the county," and that a review of Brooks' file for this purpose would have revealed the dismissal of all charges. (Pet. at 16). In addition, Brooks maintains that Sheriff Howell and his Deputies had a duty to determine whether his criminal

charges had been dismissed, even though not dismissed in open court in George County. Contrary to Brooks' protestations, none of the Respondents had any duty to periodically ascertain or verify his status as a pretrial detainee under Mississippi law.

The Fifth Circuit recently clarified the continuing "duty" owed to inmates who were initially incarcerated pursuant to a valid capias or warrant in the case of Duckett v. City of Cedar Park, Texas, 950 F.2d 272 (5th Cir. 1992). There, the Fifth Circuit stated that a police officer who arrests and incarcerates someone pursuant to a valid warrant acted reasonably, even it is later determined that the arrest was improper. Id. at 280. More importantly, the court continued by noting that a law enforcement official was under no duty to release an inmate from confinement unless he ascertained **"beyond a reasonable doubt"** that the inmate should no longer be confined. Id. at 279. Only by being notified of the entry of the order of dismissal could these Respondents have known "beyond a reasonable doubt" that Brooks should have been released.

In this case, Sheriff Howell and his Deputies lawfully, properly and rightfully incarcerated Brooks in the George County jail pursuant to a valid capias and indictment on two felony charges. There is simply no dispute about this. (R.Vol.VIp.1580-1582; Vol.IXp.430). Unlike the situation in Baker v. McCollan, 99 S.Ct. 2689 (1979), no claim of innocence was ever made by Brooks.[7] Furthermore, there was

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[7]The public policy considerations for imposing a duty to "independently investigate" in a factual scenario like Baker are greater than they are in the instant case. There, the sheriff had some notice of possible wrongful detention

no constitutional duty to "investigate independently" the possibility of an order of dismissal. Because Sheriff Howell and his Deputies were under no legal or constitutional duty to determine whether an order of nolle prosequi existed, or to routinely, regularly, or even occasionally survey and examine the records of the Circuit Clerk of George County, Brooks' claim in this regard must fail, and the Fifth Circuit properly affirmed the district court's granting of summary judgment in this respect. Nevertheless, even assuming that a duty were imposed upon Sheriff Howell and his Deputies to make themselves aware of the entry of the nolle prosequi order, their failure to discover the existence of the order is tantamount to nothing more than simple negligence. Simple negligence, as previously discussed, does not give rise to a constitutional claim as a matter of law.

Brooks contends that the Fifth Circuit's reliance on Valencia v. Wiggins, 981 F.2d 1440, 1449 (5th Cir. 1993), is allegedly contrary to this Court's prior pronouncements in California v. Hodari, 111 S.Ct. 1547 (1991), U.S. v. Mendenhall, 100 S.Ct. 1870 (1980), and Terry v. Ohio, 88 S.Ct. 1868 (1968). Brooks' contentions aside, Hodari, Mendenhall and Terry are not relevant to any issue before the Fifth Circuit or this Court since there was no dispute below concerning Brooks' initial arrest and incarceration under the Fourth Amendment. Both Hodari and Mendenhall involved questions concerning the claimant's arrest and initial seizure, while Terry addressed the issue of whether a law enforcement

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due to the plaintiff's loud protestations of innocence. Here, Brooks never claimed that he was innocent and remained totally silent (and ignorant) about the nolle prosequi order.

officer was permitted to conduct a physical search of a person for weapons when the officer had reasonable suspicion to believe the detainee may be armed. Hodari, 111 S.Ct. at 1550; Mendenhall, 100 S.Ct. at 1877; Terry, 88 S.Ct. at 1877-78.

To argue that Sheriff Howell and his Deputies had a duty to regularly or routinely inspect the records of the Circuit Clerk leads to the absurd. Such a duty would require a tremendous amount of time and manpower.[8] It would require Sheriff Howell and his Deputies to read and comprehend all court orders, some of which employ Latin phrases not of common understanding, and may be subject to the lay interpretation of Sheriff Howell and his Deputies. More importantly, should Sheriff Howell and his Deputies misunderstand the substance of an order and mistakenly release a dangerous inmate, they could be subjected to a criminal sanction or independent tort liability. Miss. Code Ann. §97-9-37 (Supp. 1996).

Based on the foregoing, Sheriff Howell and his Deputies respectfully submit that the Fifth Circuit properly rejected Brooks' claims concerning some non-existent duty allegedly imposed upon Sheriff Howell and/or his Deputies.

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[8]Suppose, for example, that Sheriff Howell and/or his deputies were required to independently learn of the existence of all orders of dismissal. Under Brooks' analysis, a daily inspection would be required, since the moment judicial authorization for an inmate's incarceration ceased to exist that inmate would, according to Brooks, no longer be lawfully confined, thereby purportedly subjecting the public official to liability under 42 U.S.C. §1983 and state tort law. This is simply not the law in Mississippi, and neither Sheriff Howell nor his Deputies were under any duty or obligation to conduct the routine review of court records that Brooks contends was required.

Conclusion

For all of the foregoing reasons, Respondents submit that Brooks' petition for writ of certiorari should be denied.

Respectfully submitted,

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